

**IN THE STATE OF MICHIGAN
COURT OF CLAIMS**

MICHIGAN ALLIANCE FOR RETIRED
AMERICANS, DETROIT/DOWNRIVER
CHAPTER OF THE A. PHILIP RANDOLPH
INSTITUTE, CHARLES ROBINSON,
GERARD MCMURRAN, JIM PEDERSEN,

Plaintiffs,

v.

JOCELYN BENSON, in her official capacity
as the Michigan Secretary of State, and DANA
NESSEL, in her official capacity as the
Michigan Attorney General,

Defendants.

Civil Action No. 2020-_____-MM

A civil action between other parties arising out of the transaction or occurrence alleged in this Complaint has been previously filed in the Michigan Court of Appeals, where it was given case number 353654. The action, entitled *League of Women Voters of Michigan, et al v Benson*, remains pending.

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs MICHIGAN ALLIANCE FOR RETIRED AMERICANS, DETROIT/DOWNRIVER CHAPTER OF THE A. PHILIP RANDOLPH INSTITUTE, CHARLES ROBINSON, GERARD MCMURRAN, and JIM PEDERSEN (collectively, “Plaintiffs”) file this Verified Complaint for Declaratory and Injunctive Relief against Defendants Jocelyn Benson, in her official capacity as the Michigan Secretary of State (the “Secretary”), and Dana Nessel, in her official capacity as the Michigan Attorney General, and allege as follows:

NATURE OF THE CASE

1. In 2018, a supermajority of Michigan voters approved a constitutional amendment to enshrine the right to vote absentee in the Michigan Constitution. In elections held since, absentee

voting has surged, reflecting the electorate's embrace of the Constitution's new guarantee that voters be permitted to exercise their most fundamental of rights in this way.

2. Even in ordinary times, it would be reasonable to expect the shift toward absentee voting to continue in Michigan. But these are not ordinary times. Over the past few months, life in the United States has changed rapidly as the result of a highly infectious, novel coronavirus, which as of the date of this filing, has infected over 1.85 million and killed over 107,000 people across the country. The pandemic has hit Michigan particularly hard, infecting Michiganders from Detroit to the Upper Peninsula. To date, there have been over 57,500 confirmed cases of coronavirus in Michigan, and over 5,500 deaths from the respiratory illness it causes, COVID-19.

3. Public health officials warn that the virus will be with us for a significant period of time—into November, certainly, when there is fear that a second, more devastating wave is likely to coincide with both flu season and the general election, and likely beyond, into at least 2021. As a result, more and more voters are understandably turning to absentee voting to safely exercise their right to the franchise.

4. On March 10, 2020—the same day that Michigan held its 2020 Presidential Primary, in which nearly a million Michiganders requested an absentee ballot—Governor Whitmer declared a state of emergency as a result of the rapid advancement of the virus. From March 23 until June 1, the State was under at least partial lockdown in an attempt to stem the virus's spread, and some restrictions in Michigan continue. The novel coronavirus has thus upended normal life in Michigan, and, if the April primary election in Wisconsin is any indication, it threatens to disenfranchise many eligible voters in the upcoming August primary election and November general election, absent relief from this Court.

5. At issue in this case are three restrictions that threaten to deny Michiganders their newly enshrined right to vote absentee, as well as their right to vote, their right to due process, their right to free speech and association, and their rights under the federal Voting Rights Act. The current public health crisis only serves to exacerbate the constitutional infirmities with these provisions, which have become increasingly undeniable as more and more Michiganders exercise their right to absentee vote.

6. *First*, Michigan law rejects any and all absentee ballots that are not *delivered* to election officials by 8 p.m. on Election Day, MCL 168.764a (“ballot receipt deadline”). Even before the current public health crisis, the Secretary acknowledged that the ballot receipt deadline should be extended because voters were being disenfranchised as a result of “more ballots transmitted through the mail” since the advent of no-excuse voting, but the pandemic has made things significantly worse. The U.S. Postal Service has reduced mail service in some parts of Michigan—including Detroit and other highly-populated areas—due to pandemic-related staffing shortages, with no end in sight; some residents have reported waiting not days, but weeks, for their mail. Once absentee voters timely submit their ballot in the mail, the Postal Service has sole control over when it arrives, and the agency’s delivery delays stemming from its current operational and budgetary difficulties will disenfranchise voters through no fault of their own. Consistent with the emergency relief adopted by a Wisconsin federal court—and approved by the U.S. Supreme Court—election officials should be required to count ballots postmarked by Election Day and received for up to 14 days after the election to allow for the delivery of delayed absentee ballots. *See Republican Nat’l Comm v Democratic Nat’l Comm*, __ US __, 140 S Ct 1205, __ L Ed __, at 1208 (2020).

7. *Second*, Michigan law requires voters who return their absentee ballots by mail to provide their own postage. MCL 168.764a(a) (the “postage requirement”). This postage requirement imposes an unnecessary monetary cost to voting at a time when many Michiganders are suffering from the devastating economic impact of the novel coronavirus. Since March 15, unemployment has grown to a staggering 1.7 million or 22 percent in Michigan, one of the highest unemployment rates in the nation. Yet, the postage requirement forces Michigan voters to either venture out and subject themselves to health risks in search of a stamp or pay significantly more to order a sheet of stamps online—both of which add significant cost and delay to the voting process, especially for those who rely on public transportation.

8. *Third*, while the receipt deadline and postage requirement add costs to absentee voting, Michigan law erects a third obstacle—this one to returning a ballot. Michigan law strictly limits who can deliver a voter’s sealed absentee ballot to their local clerk, allowing only election and postal workers and members of a voter’s household or immediate family to handle or return an absentee ballot on a voter’s behalf. *See* MCL 168.932(f); *see also id.* 168.764a. Any other person who offers to assist a voter, or who provides such assistance, is guilty of a felony, *id.* 168.932(f), punishable by up to four years’ imprisonment and a \$5,000 fine, *id.* 750.503 (collectively, “voter assistance ban”).

9. The voter assistance ban, which together with the ballot receipt deadline and postage requirement constitutes the “challenged provisions,” restricts the ability of organizations like the Alliance for Retired Americans (the “Alliance”) and the Downriver/Detroit Chapter of the A. Philip Randolph Institute (“APRI”) to engage their core constituencies and to mobilize voters by assisting voters in making the transition, many for the first time in the upcoming election, to

absentee voting. The ban also makes it harder for voters who unexpectedly find themselves without a way to return an absentee ballot on Election Day.

10. There is currently no end in sight to the daily upheaval caused by the novel coronavirus and efforts to curtail its spread. The disease will continue to threaten American lives for a long time. Recognizing the unique and serious threats to public health, the Secretary, Governor Whitmer, and other Michigan officials—in line with CDC guidance—have encouraged absentee voting in Michigan’s upcoming August primary and November general elections, in part because, as the Secretary explained, absentee voting eliminates the possibility of coronavirus transmission while voting.

11. The challenged provisions burden Michiganders’ self-executing constitutional right to vote absentee. In November 2018, Michigan voters overwhelmingly expressed an unequivocal desire to expand voting access for all citizens when they passed Proposal 3 by a supermajority. Proposal 3 enshrined in the State Constitution new self-executing voting rights, including the right to no-excuse absentee voting during the 40 days before an election and the right to choose whether to apply for, receive, and submit an absentee ballot in person or by mail. Const 1963, art 2, § 4(1)(g).

12. To protect the right to vote absentee, to vote, to due process, and to free speech and association, as well as voters’ rights under Section 208 of the Voting Rights Act, in the midst of the current pandemic, Plaintiffs therefore request that the Court issue an Order requiring Defendants to: (1) enjoin the ballot receipt deadline and extend the deadline for when ballots must be received to 14 days after Election Day; (2) enjoin the postage requirement and provide pre-paid postage for all absentee ballot envelopes; and (3) enjoin the voter assistance ban and permit third parties to assist voters in submitting their sealed absentee ballots. With the primary and general

elections fast approaching, the time to act is now, to prevent widespread disenfranchisement and effectuate the will of the voters so that all will have a safe and meaningful opportunity to participate in Michigan's elections.

JURISDICTION AND VENUE

13. Plaintiffs bring this action under Article I, Sections 3 and 5 and Article II, Section 4 of the Michigan Constitution, 42 USC 1983, and 52 USC 10508.

14. This Court has jurisdiction over the subject matter of this action pursuant to Michigan Compiled Laws Section 600.6419.

15. This Court has personal jurisdiction over the Defendants, the Secretary of State and the Attorney General, who are sued in their official capacities only.

16. Venue is proper in this Court pursuant to Michigan Compiled Laws Section 600.6419, because this is a constitutional claim against the Secretary of State and Attorney General.

17. This Court has the authority to enter a declaratory judgment under Michigan Court Rule 2.605. It has authority to enter an injunction under the Michigan Constitution. *Sharp v City of Lansing*, 464 Mich 792; 629 NW2d 873 (2001).

18. All conditions precedent to the maintenance of this case and Plaintiffs' claims have occurred, been performed, or otherwise been waived.

PARTIES

19. Plaintiff MICHIGAN ALLIANCE FOR RETIRED AMERICANS ("the Alliance") is incorporated in Michigan as a 501(c)(4) nonprofit, social welfare organization. The Alliance has over 200,000 members, comprising of retirees from 23 public and private sector unions, community organizations, and individual activists. Some of its members are disabled, and many are elderly. It is a chartered state affiliate of the Alliance for Retired Americans. The Alliance's

mission is to ensure social and economic justice and full civil rights that retirees have earned after a lifetime of work. The challenged provisions frustrate the Alliance's mission because they deprive individual members of the right to vote and to have their votes counted, threaten the electoral prospects of Alliance-endorsed candidates whose supporters will face greater obstacles casting a vote and having their votes counted, and make it more difficult for the Alliance and its members to associate to effectively further their shared political purposes. Because of the burdens on absentee voting created by the challenged provisions, the Alliance will be required to devote time and divert resources from other efforts to educating its members about these requirements and assisting them in complying so that their absentee ballots are received by Election Day, accepted, and counted. These efforts will reduce the time and resources the Alliance has to educate its members and legislators on public policy issues critical to the Alliance's members, including the pricing of prescription drugs and the expansion of Social Security and Medicare and Medicaid benefits.

20. The Alliance also brings this action on behalf of its members who face burdens on their right to vote as a result of the challenged provisions. Because all of the Alliance's members are of an age that place them at a heightened risk of complications from coronavirus, all members are overwhelmingly likely to vote absentee this year and consequently face the burdens that the challenged provisions place on absentee voters. The Alliance's members, for example, are voters who are likely to face difficulty acquiring postage and delivering an absentee ballot themselves should they be unable to return it through the mail in sufficient time for their ballot to be counted. Additionally, many of the Alliance's members will be absentee voting for the first time, and thus will be more susceptible to disenfranchisement by the ballot receipt deadline.

21. Plaintiff DOWNRIVER/DETROIT CHAPTER OF THE A. PHILIP RANDOLPH INSTITUTE (“APRI”) is the local chapter of the national 501(c)(3) nonprofit organization the A. Philip Randolph Institute. The A. Philip Randolph Institute, founded in 1965 by A. Philip Randolph and Bayard Rustin, is the senior constituency group of the AFL-CIO. APRI is a membership organization with the mission to continue to fight for Human Equality and Economic Justice and to seek structural changes through the American democratic process. APRI’s members are involved in voter registration, get-out-the-vote activities, political and community education, lobbying, legislative action, and labor support activities in the Detroit and Downriver areas of Michigan.

22. APRI works to educate voters about their voting options, to encourage voters to cast their ballots, and to provide assistance to help members of the Detroit/Downriver community vote, both in person and through absentee ballots. Some of APRI’s work specifically targets voters who are disabled and voters who speak Spanish and Arabic as their first language.

23. In past elections, APRI has worked to inform individuals of their ability to cast absentee ballots. Before Proposal 3, that eligible group of individuals who could absentee vote was limited to people who had certain difficulties making it to the polls on Election Day. Now that Proposal 3 has made absentee voting available to all, APRI would like to educate voters about the opportunities to apply to vote absentee in future elections, and to facilitate absentee voting by, among other things, collecting and returning ballots for its members.

24. Plaintiff CHARLES ROBINSON is a U.S. citizen and registered voter in Southfield. Robinson is 77 years old, a retired City of Detroit Social Studies teacher, and a member of the Michigan Alliance for Retired Americans. He currently serves as president of the American Federation of Teachers’ statewide retiree chapter in Michigan. Voting is important to Mr.

Robinson, and he has voted absentee for the past 25 years because he is usually busy on Election Day working or volunteering on campaigns. Mr. Robinson intends to vote absentee again this year, especially because he is a polio survivor and does not want to take the unnecessary risk of venturing out to cast a ballot in the context of the coronavirus pandemic. Mr. Robinson is particularly concerned about potential slowdowns in mail delivery service due to the coronavirus. He is worried that his ballot will not be counted if it is not received by his clerk's office by the Election Day receipt deadline, and he would be more confident that his ballot would be counted if Michigan were required to count ballots postmarked by Election Day.

25. Plaintiff GERARD MCMURRAN is a U.S. citizen and registered voter in Rockwood. Mr. McMurrán is 65 years old, previously worked for the United Steelworkers, and is a member of the Michigan Alliance for Retired Americans. Voting is important to Mr. McMurrán, who usually votes in person on Election Day. Due to the coronavirus pandemic, however, Mr. McMurrán does not want to take the unnecessary risk of standing in line to cast his ballot, particularly because he is a two-time cancer survivor with diabetes and anemia. As a result, Mr. McMurrán intends to rely on the mail to cast his ballot this year. Because his city does not provide prepaid postage, Mr. McMurrán must acquire and pay for postage before he can return his absentee ballot. Mr. McMurrán is also particularly concerned about potential slowdowns in mail delivery service due to the coronavirus. He is worried that his ballot will not be counted if it is not received by his clerk's office by the Election Day receipt deadline, and he would be more confident that his ballot would be counted if Michigan were required to count ballots postmarked by Election Day.

26. Plaintiff JIM PEDERSEN is a U.S. citizen and registered voter in Belleville. Pedersen is 61 years old, previously worked for the United Auto Workers and the Ford Motor Company, and is a member of the Michigan Alliance for Retired Americans. Since moving to

Michigan decades ago, Mr. Pedersen has usually voted absentee because he is busy volunteering on Election Day to get out the vote and participate in voter protection efforts at the polls. Mr. Pedersen intends to volunteer this year as well, and therefore, he plans to rely on the mail to cast his ballot again. Because his city does not provide prepaid postage, Mr. Pedersen must acquire and pay for postage before he can return his vote-by-mail ballot. Mr. Pedersen is also particularly concerned about potential slowdowns in mail delivery service due to the coronavirus and the U.S. Postal Service's budgetary concerns. He is worried that his ballot will not be counted if it is not received by his clerk's office by the Election Day receipt deadline, and he would be more confident that his ballot would be counted if Michigan were required to count ballots postmarked by Election Day.

27. Defendant, JOCELYN BENSON, is the Secretary of State of Michigan and is sued in her official capacity. She is Michigan's chief elections officer and, as such, has "supervisory control over local election officials in the performance of their duties." MCL 168.21. She is specifically responsible for "[a]dvis[ing] and direct[ing] local election officials as to the proper methods of conducting elections" and providing to each precinct "specific instructions on assisting voters in casting their ballots," MCL 168.31(1)(b) & (c). The Secretary, personally and through the conduct of her employees, officers, agents, and servants, acted under color of State law at all times relevant to this action.

28. Defendant DANA NESSEL is sued in her official capacity as the Michigan Attorney General. She is Michigan's top law enforcement official and is responsible, along with other prosecuting attorneys, for prosecuting the laws of the State of Michigan, including the voter assistance ban. MCL 168.940. The Attorney General, personally and through the conduct of her

employees, officers, agents, and servants, acted under color of State law at all times relevant to this action.

GENERAL ALLEGATIONS

I. The coronavirus pandemic has upended Michigan’s electoral processes.

29. Virtually all aspects of life in Michigan today are affected by the unprecedented coronavirus pandemic.

30. Since March 23, 2020, Michigan has been under at least partial lockdown. Schools and businesses are closed; the vast majority of people are sheltering in their homes; more than 1.7 million Michiganders have lost their jobs since March 15; more than 57,500 individuals are confirmed to have coronavirus and 5,500 people have tragically lost their lives to COVID-19 in the State.

31. No part of Michigan has been spared. Initially, the virus hit Southeastern Michigan hard, but then it spread throughout the State.

32. The virus has also begun to wreak havoc on Michigan’s voting systems. Several counties held an election on May 5, and clerks across the State reported difficulty recruiting and retaining poll workers, many of whom are elderly.

33. Michigan also saw a significant reduction in the number of polling places offered for in-person voting in the May 5 election. Executive Order 2020-27, which governed that election, only required that “each jurisdiction. . . maintain at least one (1) location on election day where any voter can appear in-person to receive and submit a ballot.” Venues that typically served as polling locations—like senior centers—were understandably unwilling to do so in the upcoming election because of the attendant public health risks.

34. For the limited group of poll workers who agreed to staff polling places on Election Day, and the few locations that agreed to open their doors to the public, election officials faced a hesitant electorate.

35. Indeed, only 850 individuals voted in person in the May 5 election, compared to a staggering 180,000 individuals who voted absentee.

A. Many Michiganders will rely on absentee voting during the pandemic.

36. Because packing more voters into fewer polling places could spell disaster from a public health perspective, many Michiganders will understandably turn to absentee voting in the upcoming elections, like they did in the May 5 election.

37. Since 2019, all Michiganders have had the unequivocal and self-executing constitutional right “to vote an absent[ee] voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail.” Const 1963, art 2, § 4(1)(g).

38. Voters themselves created the right to vote absentee by overwhelmingly passing Proposal 3 in 2018, which is now enshrined in the State Constitution.

39. Unsurprisingly, absentee voting surged in the recent March 10, 2020 primary election, in which nearly a million Michiganders requested absentee ballots.

40. In the subsequent May 5, 2020 local elections, 99 percent of those who voted cast absentee ballots.

41. The upward trend in absentee voting is expected to continue in the coming August and November elections this year.

42. Michigan officials have encouraged absentee voting, especially during this pandemic.

43. As Governor Whitmer explained, “[t]he fewer people we have lining up at polling places the better, ensuring Michiganders safely practice social distancing while allowing them to safely exercise their right to vote in local elections.”¹

44. The Secretary agreed, stating: “[o]ur sharpest tool to ensure citizens do not have to choose between casting a ballot and risking their health is the constitutional right they have to absentee vote, which voters themselves enshrined in our state constitution in 2018.”²

45. The Secretary’s and Governor’s encouragement of absentee voting is in line with CDC’s recommendation that jurisdictions encourage absentee voting and reduce voting methods that lead to direct contact with other voters or poll workers. And Congress recently authorized \$400 million to help states transition to absentee voting during the public health crisis.

B. The novel coronavirus reveals and exacerbates existing inadequacies in Michigan’s absentee voting system.

46. Absentee voters must complete several steps well in advance of Election Day to ensure that they will be able to successfully cast an effective ballot.

47. The Secretary has sent absentee ballot applications to all voters in advance of the primary and general election in 2020.

48. After receiving the application, voters must submit the absentee ballot application to their city or township clerk, which can be done in person, by email, by fax, or by mail.

¹ Office of Governor Gretchen Whitmer, *Governor Whitmer Signs Executive Order Expanding Absentee Voting in May 5 Elections* (Mar 27, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90640-523402--,00.html.

² *Id.*

49. An application to vote absentee submitted by mail must be received by the clerk by 5 p.m. on the Friday before Election Day, *see* MCL 168.759(1), though an individual applying in person for an absentee ballot can do so until 4 p.m. on the day before Election Day. *Id.* 168.761(3).³

50. Next, the voter's local clerk must process the ballot request and mail the voter's ballot; upon receipt, the voter must then fill out the ballot, place the ballot in a specially designated, sealed secrecy envelope and sign the outside of the envelope, and mail the ballot with sufficient postage to ensure that it gets delivered to their local clerk before 8 p.m. on Election Day, or deliver the ballot in person. *Id.* 168.764a; *see also id.* 168.759b; 168.765(3)-(5).

51. These steps are not insubstantial, often requiring significant time and effort from voters to complete. A misstep at any point—including a delay in processing ballot requests, or in the U.S. Postal Service's delivery of the absentee ballot application or the ballot itself—can result in complete disenfranchisement.

52. The U.S. Postal Service is currently experiencing operational difficulties, delivery delays, and budget shortfalls. As the pandemic continues to spread, postal workers have increasingly been infected. More than 2,800 postal workers across the country have tested positive for the coronavirus and more than 60 have died, while at least 17,000 have been sent into self-quarantine because of exposure to the coronavirus. These pressures threaten to shutter the entire agency by this summer.

53. Postal workers in Michigan are no different. Reports of the virus infecting Postal Service employees throughout the State abound. As of early May, there were 113 confirmed

³ A voter who registers to vote in person on Election Day, however, can apply for and obtain an absentee ballot until 8 p.m. that day. *See* MCL 168.759(2). And individuals who register to vote in person right before or on Election Day can request an absentee ballot and vote an absentee ballot at the same time. *See* Sec'y of State, *Absentee Voting Allows You to Vote by Mail*, https://www.michigan.gov/sos/0,4670,7-127-1633_8716-21037--,00.html.

COVID-19 cases of Postal Service employees in the Detroit, Pontiac, and Flint area, a handful of cases in Western Michigan, and three in Saginaw. And at least two Postal Service employees in Detroit have passed away as a result of COVID-19. One postal service worker described that the main post office branch in Detroit is staffed at only 50 percent because of the pandemic. And some Detroit mail has been redirected from Southeastern Michigan to processing centers in Western Michigan due to staffing shortages.

54. The U.S. Postal Service has also reduced its standard mail service in parts of Michigan. The agency stated in early April that mail will only be delivered every other day in heavily-populated Detroit and in some metro areas (i.e. in zip codes beginning with 480-485 and 492) as a result of staffing shortages due to the coronavirus.

55. Some Michigan residents reported mail delays far in excess of a few days. In Oakland County, for instance, residents reported not receiving any mail for two to three weeks. And, as of this filing, the U.S. Postal Service has not indicated when, if ever, it will resume regular mail service.

56. Due to the ongoing budgetary and personnel shortages, and the absence of any permanent solution, there is no end in sight to the Postal Service's delivery delays in Michigan. In the past, when the U.S. Postal Service faced a budget crisis, it responded by closing hundreds of processing centers. Moving forward, it is likely that the U.S. Postal Service will continue to make cuts to routes, processing centers, or staff due to the pandemic—any of which will continue to increase mail processing delays.

57. In upcoming elections, the U.S. Postal Service will attempt to deliver an unprecedented number of absentee ballot applications and ballots across the country and in Michigan—both from election officials to voters, and then back again. The system will be under

increasing pressure, causing delays and, ultimately, some number of absentee ballot applications and ballots that are not received by voters in time to complete the voting process before the ballot receipt deadline. Indeed, in the March 10 primary election in Michigan, there was a 97 percent increase in requests for absentee ballots as compared to 2016, which has been attributed to “fear” of COVID-19 and the expansion of such voting. And due to mail delivery delays, some voters reported that they did not receive timely requested absentee ballots for the May 5 election.

C. The April primary in Michigan’s neighboring state of Wisconsin illustrates the need for additional safeguards.

58. The recent primary election in Wisconsin serves as a cautionary tale because election officials and absentee voters encountered many of the same issues leading up to Election Day that Michiganders will face, including backlogs of requests for absentee ballots and questions about absentee voting, the loss of poll workers due to age, fears of illness, or actual illness, and delayed mail delivery. *Democratic Nat’l Comm v Bostelmann*, No. 20-CV-249-WMC, 2020 WL 1638374 at *1 (WD Wis, Apr 2, 2020).

59. When Wisconsin proceeded to hold the election without sufficiently addressing these issues, chaos and widespread disenfranchisement ensued as the U.S. Postal Service struggled to deliver absentee ballots to voters. Some ballots were delayed, but others did not arrive at all, which spurred both of Wisconsin’s U.S. Senators to write to the Inspector General for the U.S. Postal Service seeking an investigation into “absentee ballots not being delivered in a timely manner.”⁴ There were similar delays returning ballots to election officials. In total, a staggering number of absentee ballots—approximately 107,871—were received by election officials after Election Day.

⁴ See Letter from Senators Tammy Baldwin and Ron Johnson to U.S. Postal Service Inspector General (Apr 9, 2020), <https://www.wispolitics.com/wp-content/uploads/2020/04/200409LETTER.pdf>.

60. Additionally, cities in Wisconsin were forced to close polling locations due to the pandemic. In Milwaukee, a city of around 600,000 people, 18,803 voters cast their ballots in person at only five polling locations. The result was crowded polling places, long lines, and excessive wait times.

61. Even more troubling are reports of 67 new coronavirus infections among in-person voters and poll workers who participated in Wisconsin's April 7 primary.

II. In the face of the continuing pandemic, Michigan must take steps now to protect the fundamental voting rights of all Michiganders.

62. Without adequate safeguards to ensure access to absentee voting, Michiganders could suffer the same fate in upcoming elections: widespread disenfranchisement and unnecessary exposure to the health risks posed by the coronavirus pandemic. The federal government has announced that it is preparing for the coronavirus crisis to last 18 months and has warned that the pandemic could come in "multiple waves."

63. Recently, the White House's coronavirus advisor and the Director of the National Institute of Allergy and Infectious Diseases, Dr. Anthony Fauci, was asked at a White House press conference whether the United States was "prepared for [coronavirus] to strike again, say, in the fall?" Dr. Fauci responded that, "[i]n fact[,] I would anticipate that that would actually happen because of the degree of transmissibility."

64. Similarly, the Director of the National Center for Immunization and Respiratory Diseases at the CDC, Dr. Nancy Messonnier, said in March 2020 that she expected the virus to continue spreading in the United States until next year.

65. These sentiments are also shared by scientists outside the United States government. The COVID-19 Response Team at the Imperial College of London has estimated that

social distancing and other preventative measures will be required until a vaccine is developed and distributed widely, which they predict could take “18 months or more.”

66. By all accounts, the current public health crisis is expected to last well into the 2020 general election cycle.

67. Even if coronavirus cases in Michigan significantly decrease by the upcoming elections, CDC guidelines still recommend that individuals take meaningful social distancing measures to protect the most vulnerable among us. This guidance is necessitated by the reality that asymptomatic carriers appear to be contributing significantly to community spread, and until there is a vaccine or widespread “herd immunity” (i.e., at least 60 percent of the population has been infected and recovered), Americans will remain at serious risk of contracting this unpredictable and deadly virus. Access to in-person voting will remain limited and will continue to pose health risks for voters.

68. The ongoing challenges introduced by the pandemic have exposed significant infirmities in Michigan’s absentee voting procedures, which unlawfully hinder the ability for many eligible citizens—particularly those in disadvantaged communities, the poor, the elderly, individuals with disabilities, and other vulnerable populations—to successfully exercise their right to vote. Many of these individuals have historically relied on absentee voting and will be even more likely to do so in upcoming elections.

69. To ensure that all citizens have reasonable and equal access to the electoral process, the State must remove unnecessary barriers that will otherwise deny its citizens rights guaranteed by the Michigan Constitution and violate federal law.

A. The Ballot Receipt Deadline.

70. In the 2018 general election, according to data from the Election Administration and Voting Survey, approximately 2,207 absentee ballots were rejected because they were delivered to election officials after 8 p.m. on Election Day. And in the 2016 general election, 2,140 absentee ballots were rejected on that basis.

71. In the November general election in 2018, Michigan voters passed Proposal 3, which amended the Michigan Constitution to allow all eligible citizens to vote absentee without an excuse. Const 1963, art 2, § 4(1)(g). Since then, absentee voting has surged in popularity. And because of the significantly increased volume of absentee ballots in the mail around Election Day, the Secretary publicly advocated for changing the ballot receipt deadline even before the pandemic.

72. The disruptions in the voting process caused by the coronavirus pandemic will make matters worse. The ability to process absentee ballot applications and deliver applications and ballots on time has been compromised by the public health crisis.

73. The growing demand for absentee ballots is already testing the limits of some jurisdictions, like the City of Muskegon, which urged voters to return their application forms immediately and then enlisted the help of other city government departments to count and process the ballots themselves for the May 5, 2020 election.

74. And as the number of self-quarantined and infected postal workers increase nationally and locally, the U.S. Postal Service will continue to face severe staffing shortages, and the delivery delays to certain high-density zip codes in Michigan will persist. Due to delayed mail delivery, some voters did not receive timely requested absentee ballots for the May 5 election.

75. Because absentee ballots must be received by 8 p.m. on Election Day, voters must normally mail them multiple days or even up to a week or more before Election Day to ensure timely delivery. This date operates as a shadow pre-election cutoff date. But given the recent, rapid expansion of mail ballots, the pre-election cutoff date by which voters should mail or request their ballots to ensure timely delivery is entirely unclear, subjecting voters to arbitrary disenfranchisement.

76. For instance, Michigan voters can apply for absentee ballots by mail if their applications are received by the local clerk by 5 p.m. on the Friday before Election Day. *See* MCL 168.759(1).⁵ If a voter submitted their absentee ballot application on time, or even several days before this deadline, it is anyone's guess whether that voter would receive their ballot before Election Day, or with enough time to complete and submit the ballot by the receipt deadline. It is even less likely now, during the pandemic, that the ballot will be issued to the voter, and, in turn, delivered to their city or township clerk all before the Election Day receipt deadline.

77. Although Michigan may have an interest in the finality of elections, the State can continue to advance this interest while providing sufficient time for the delivery of ballots that are all but certain to be delayed—due to the introduction of no-excuse absentee voting, the coronavirus pandemic which will force even more Michiganders to vote absentee, and mail service reductions and delays—in order to ensure that its citizens have an opportunity to exercise their constitutional right to vote absentee.

78. There is nothing sacrosanct about the ballot receipt deadline, and Plaintiffs' requested remedy is not a significant departure from already existing procedures. For voters living

⁵ A voter who registers to vote in person on Election Day, however, can apply for and obtain an absentee ballot until 8 p.m. that day. *See* MCL 168.759(2).

overseas, for instance, the deadline to return an absentee ballot must be extended if the clerk is delinquent in transmitting the ballots to overseas voters. *See id.* Yet no accommodations are available for absentee voters living in Michigan whose ballots are delayed.

79. Flatly rejecting all absentee ballots that arrive after 8 p.m. on Election Day, disenfranchises Michigan voters—many of whom also lack reasonable access to safe, in-person voting options during the pandemic—for reasons entirely beyond their control.

B. The Postage Requirement.

80. In Michigan, absentee voters who return their ballots by mail must provide “the necessary postage upon the return envelope.” MCL168.764a(a).

81. This postage requirement imposes both monetary and transaction costs that bear most heavily on individuals who are least likely to be able to overcome them.

82. In this digital era, many voters—and young voters in particular—do not regularly keep postage stamps in their homes.

83. Thus, Michiganders are forced to visit a post office or other essential business that sells stamps, or purchase stamps online in order to exercise their constitutional right to vote absentee. Each option imposes costs that significantly exceed the currently published postage rates.

84. A trip to the post office (or any other establishment that sells stamps), especially during the present public health crisis in which individuals have been instructed to maintain social distancing to ensure that they do not inadvertently spread or contract a potentially deadly disease, forces voters to expose themselves to health risks and incur other ancillary burdens, in order to vote.

85. While a voter can order stamps online through the U.S. Postal Service website, the stamps take 5 to 7 days to be delivered under normal circumstances; they are not sold individually;

they must be purchased on a sheet of stamps that costs a minimum of \$11.00; and the purchaser must pay for shipping and handling of the stamps themselves.

86. Purchasing stamps online could cost voters more than \$11—an unnecessary expense that can be cost prohibitive particularly for financially vulnerable individuals, some of whom are among the 1.7 million Michiganders whose employment and source of income were eradicated due to the devastating economic impact of the coronavirus.

87. The amount of postage required for an absentee ballot is also not readily apparent to voters. Absentee ballots include two envelopes and have varying weight depending on the number of elections on the ballot. As a result, even where voters have stamps, mailing their ballot may still necessitate a trip to the post office to weigh the envelope and determine the proper amount of postage to affix.

88. Voters who receive their ballots too late to be sure that they will be timely delivered if they use regular First-Class postage may have to incur substantial additional cost expediting or overnighting their ballots. And they similarly may have to leave the safety of their homes and interact with others in order to do so.

89. Providing pre-paid postage to allow citizens to complete important government-related functions is a common practice that has been adopted by federal, state, and county governments in other contexts. For instance, the United States Census Bureau sends census surveys with postage-prepaid return envelopes. Michigan provides, as the National Voter Registration Act requires, a postage-prepaid return envelope when it asks voters to verify their address for the purpose of voter registration. Pursuant to Executive Order 2020-27, Michigan also sent absentee ballot envelopes to individuals voting in the May 5 election with prepaid postage. And in its

coronavirus stimulus package, Congress allocated \$400 million for elections, which can be used to cover the cost of prepaying postage, among other expenses.

90. Studies have shown that sending absentee ballots in postage-prepaid envelopes increases absentee voter turnout. When King County, Washington launched prepaid postage pilot programs during the 2017 and 2018 primary elections, the county found that voters returned their absentee ballots via the U.S. Postal Service at higher rates when they received return envelopes with postage prepaid. In the 2016 general election, 48 percent of the tested group of voters returned their absentee ballots via the U.S. Postal Service. In the 2017 election, that number jumped to 81 percent, and turnout increased by 10 percent. In the 2018 primary, turnout rose by 6 percent. Following these pilot programs, King County sent all absentee ballots with postage-prepaid return envelopes. And shortly after, the Governor and Secretary of State of Washington funded prepaid postage for every county in the state.

91. While Michigan's efforts to provide prepaid postage in the May 5, 2020 election are laudable, the barriers to absentee voting will continue to disenfranchise voters in future elections. Absent injunctive relief, Michiganders will continue to incur costs, and, in some cases, put their health at risk, just to exercise their constitutional right to vote absentee.

C. The Voter Assistance Ban.

92. Michigan voters have two options for returning their absentee ballots: by mail or in person. The postage requirement and ballot receipt deadline imbue the first option with cost and risk of disenfranchisement, and the voter assistance ban significantly curtails the second.

93. Specifically, the voter assistance ban prohibits organizations like the Alliance and APRI from engaging voters through absentee voting by offering to assist to return their absentee ballots, and it limits the ability of individuals from requesting assistance from anyone but a narrow group of people.

94. It is common for political campaigns and advocacy organizations outside of Michigan to offer assistance and to assist voters in absentee voting. This interaction fosters conversations about why voting is important and how voting can build political power within a community. The voter assistance ban, by prohibiting the offer or provision of assistance in delivering a ballot, prevents these interactions from occurring.

95. The voter assistance ban not only hurts organizations seeking to persuade voters to action but also curtails voters' ability to return their absentee ballots. The voter assistance ban significantly narrows the persons available to assist voters to election and postal workers and members of the voter's household or immediate family. MCL 168.932(f). For voters who live alone or away from family, they are required to ask for assistance from strangers (election workers who may be experiencing a staffing shortage)—a particularly unsavory option given the current public health crisis—rather than rely on trusted friends or neighbors. And election workers are only required to provide assistance if requested to do so by the Friday before Election Day. *See id.* 168.764a(d); 168.764a(4).

96. Michigan has an aging population, ranking 18th among the 50 states by the size of its population over the age of 65 based on 2016 Census estimates. Seniors, especially those living in community homes or nursing homes, are particularly vulnerable to the current health risks and have expressed concern that they have no reliable way to deliver their ballots to the proper polling site; they cannot trust that the ballot will be delivered on time through the U.S. Postal Service and they cannot personally deliver the ballot due to health concerns. Moreover, 27 percent of adults ages 60 and older live alone in the United States.

97. The voter assistance ban also disproportionately burdens voters living in poor, minority, and rural communities as well as voters who are disabled, because they generally have

less access to postal services, live in areas that lack reliable access to public transportation, and/or are less able to bear the costs of waiting in long lines to vote or exposing themselves to health risks in order to submit an absentee ballot in person. Voters in rural communities, moreover, face longer travel distances to their clerk's office and less reliable mail service.

98. No-excuse absentee voting is a positive step for Michigan and is now a self-executing constitutional right. But, as discussed, many voters who exercise their right to vote absentee will not have any sufficiently reliable means of submitting those ballots in time without undue burden or significant risk of disenfranchisement.

99. To the extent that the voter assistance ban is intended to serve as an anti-fraud mechanism, it is unnecessary. Michigan does not have any significant history of voting fraud generally or, in particular, of absentee voting fraud.

100. And the voter assistance ban is entirely duplicative of other, more tailored Michigan laws. Interference with absentee voting is criminalized in at least six other ways: (1) it is a felony to forge a signature on an absentee ballot application, MCL 168.759(8); (2) it is a felony to mark, alter, or switch an absentee ballot, *id.* 168.932(e); (3) it is a felony to "suggest or in any manner attempt to influence" a voter filling out an absentee ballot, *id.* 168.932(g), (h); (4) it is a felony to bribe a voter, *id.* 168.932(a); (5) it is a misdemeanor to promise or receive something of value for deciding whether and for whom to vote, *id.* 168.931(1)(a), (b); and (6) it is a misdemeanor to, in any other way, violate the Michigan Election Laws, *id.* 168.931(2).

101. Thus, the voter assistance ban leads to disenfranchisement for some voters.

CLAIMS FOR RELIEF

COUNT I

Michigan Constitution of 1963, art 2, § 4 ***Undue Burden on the Right to Vote Absentee***

102. Plaintiffs reallege and reincorporate by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

103. Article 2, Section 4(1)(g) of the Michigan Constitution—which is a self-executing provision, *id.* § 4(1)—guarantees “[t]he right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail.”

104. Because Article II, Section 4(1)(g) is a self-executing provision, “[o]bligations other than those so imposed may not be added.” *Soutar v St Clair Cty Election Comm*, 334 Mich 258, 265; 54 NW2d 425 (1952); *see also Wolverine Golf Club v Hare*, 384 Mich 461, 466; 185 NW2d 392 (1971) (explaining that the legislature may not enact laws that undermine self-executing provisions: “the right guaranteed shall not be curtailed or any undue burdens placed thereon”) (citation omitted).

105. Michigan’s ballot receipt deadline, postage requirement, and voter assistance ban add multiple such obligations that individually and together curtail and unduly burden Michigan’s constitutional right to vote absentee.

106. First, the ballot receipt deadline results in the rejection of absentee ballots that voters submit “during the forty (40) days preceding an election.” Const 1963, art 2, § 4(1)(g). For example, voters who mail their completed ballot the day before an election will have their ballot rejected if it arrives at the clerk’s office more than one day later. The ballot receipt deadline thus,

on its face, denies voters their self-executing right “to choose” to submit their absentee ballots “by mail” at any time within 40 days of Election Day. *Id.*

107. Second, the postage requirement adds a literal cost to exercising the right to vote absentee. The cost burdens voters’ self-executing right “to choose” to submit their absentee ballots “by mail.”

108. Third, the voter assistance ban effectively disenfranchises voters who require last minute assistance to return their absentee ballots, but do not have an immediate family or household member who is willing or able to provide such assistance. By narrowly defining the subset of individuals who can return a voter’s ballot in person, the voter assistance ban unduly burdens and curtails voters’ self-executing right “to choose” to submit their absentee ballots “in person.”

109. Unless the challenged provisions are enjoined, many prospective voters will be deterred or excluded from exercising their constitution right to vote absentee. The result will be severe and irreparable harm to Plaintiffs.

COUNT II

Michigan Constitution of 1963, art 1, § 2

Undue Burden on the Right to Vote

(Ballot Receipt Deadline, Postage Requirement, Voter Assistance Ban)

110. Plaintiffs reallege and reincorporate by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

111. The right to vote is a “fundamental political right . . . preservative of all rights,” *Reynolds v Sims*, 377 US 533, 562; 84 S Ct 1362; 12 L Ed 2d 506 (1964) (quoting *Yick Wo v Hopkins*, 118 US 356, 370; 6 S Ct 1064; 30 L Ed 220 (1886)), and is protected by the Michigan Constitution. *See* Const, art. I, § 3; *see also in re Request for Advisory Op Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 35-36; 740 NW2d 444 (2007). In particular, Article

I, Section 2 of the Michigan Constitution provides that “[n]o person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights. . . .”

112. A court considering a challenge to a Michigan election law must carefully balance the character and magnitude of injury to the rights that the plaintiff seeks to vindicate against the justifications put forward by the State for the burdens imposed by the rule. *See id.* (adopting the *Anderson-Burdick* standard); *see also Burdick v Takushi*, 504 US 428, 434; 112 S Ct 2059; 119 L Ed 2d 245 (1992); *Anderson v Celebrezze*, 460 US 780, 789; 103 S Ct 1564; 75 L Ed 2d 547 (1983). This balancing test utilizes a flexible sliding scale, where the rigorousness of scrutiny depends upon the extent to which the challenged law burdens voting rights. *See id.*

113. Courts need not accept a state’s justifications at face value, particularly where those justifications are “speculative,” otherwise it “would convert *Anderson-Burdick*’s means-end fit framework into ordinary rational-basis review wherever the burden a challenged regulation imposes is less than severe.” *Soltysik v Padilla*, 910 F3d 438, 448–49 (CA 9, 2018) (citing *Pub. Integrity All v City of Tucson*, 836 F3d 1019, 1024–25 (CA 9, 2016)); *see also Crawford v Marion Cty Election Bd*, 553 US 181, 191; 128 S Ct 1610; 170 L Ed 2d 574 (2008) (Stevens, J., controlling op.) (“However slight th[e] burden may appear, . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.”) (internal citation and quotation marks omitted) (emphasis added).

114. Michigan’s ballot receipt deadline, postage requirement, and voter assistance ban, especially when combined with the effects of the pandemic, impose a severe burden on the right to vote of all Michiganders who vote absentee, or who may be forced to vote in person and risk their health in order to participate in upcoming elections.

115. The ballot receipt deadline, even on its own, imposes a severe burden on the right to vote and results in the disparate treatment of voters. Voters must first guess, in the absence of regular mail service, when their ballot must be mailed in order to arrive by 8 p.m. on Election Day, assuming they receive their ballot in time to meet the deadline to begin with. For those voters who, through no fault of their own, misjudge how long it will take for the U.S. Postal Service to deliver their ballots, or who do not receive their ballots sufficiently in advance of Election Day to mail it back to their local clerk, the punishment is swift and severe: total disenfranchisement. And the ballot receipt deadline treats voters differently: two voters who mail their absentee ballots out on the same day are treated differently, when one lives in an area where the U.S. Postal Service has delayed mail service, whereas the other is experiencing normal mail service.

116. Michigan's postage requirement imposes monetary costs on absentee voting. These costs bear most heavily on economically vulnerable voters, including those who are affected by the devastating economic impact of the ongoing public health emergency. Even for voters able to pay the monetary costs, the postage requirement imposes other ancillary burdens—including time and expense of traveling to a post office to purchase stamps—that will dissuade voters, especially those with disabilities, limited access to transportation, and voters concerned about the attendant health risks. And there is little justification for failing to provide pre-paid postage given the current limitations on in-person voting and the additional funding provided by the federal government. Thus, Michigan's failure to provide an opportunity for eligible citizens to vote absentee, without cost, imposes an undue burden on the right to vote.

117. Similarly, the voter assistance ban imposes a severe burden on the right to vote because it will effectively disenfranchise voters who require last minute assistance in returning

their absentee ballots, but do not have an immediate family member or household member who is willing and able to provide such assistance.

118. In short, Michigan’s ballot receipt deadline, postage requirement, and voter assistance ban each individually and cumulatively impose severe burdens on the right to vote that are not justified by a sufficient state interest, and thus violate the Michigan Constitution.

COUNT III

Michigan Constitution of 1963, art 1, § 17 *Denial of Due Process* (Ballot Receipt Deadline)

119. Plaintiffs reallege and reincorporate by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

120. The Due Process Clause of the Michigan Constitution of 1963 prohibits the State from depriving any person of “liberty . . . without due process of law.” Const 1963, art 1, § 17. “The due process guarantee of the Michigan Constitution is coextensive with its federal counterpart.” *Grimes v Van Hook-Williams*, 302 Mich App 521, 530; 839 NW2d 237 (2013).

121. The right to vote absentee is a liberty interest specifically enshrined within the Michigan Constitution. Const 1963, art 2, § 4(1)(g). That right guarantees to each Michigander the ability to vote absentee during the 40 days preceding Election Day. *Id.*

122. Because the right to vote absentee is a liberty interest guaranteed by the Michigan Constitution, “due process demands that minimal procedural protections be afforded an individual before the state can” impose a “burden” on that right. *In re Sanders*, 495 Mich 394, 410; 852 NW2d 524, 532 (2014). An evaluating court must employ the balancing test articulated in *Mathews v Eldridge*, 424 US 319, 334-35; 96 S Ct 893, 47 L Ed 2d 18 (1976), to determine what protections are due in a given case. *Sanders*, 495 Mich at 411. “In essence, the *Eldridge* test balances the costs of certain procedural safeguards . . . against the risk of not adopting such procedures.” *Id.*

Specifically, the *Eldridge* test requires a court faced with a due process challenge to consider three factors: (1) “the private interest that be affected by the official action”; (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and (3) “the [g]overnment’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Id.* at 410 (quoting *Mathews*, 424 US at 333-34).

123. This test has been deployed by courts across the country to strike down laws governing absentee voting procedures. *See Raetzel v Parks/Bellefont Absentee Election Bd.*, 762 F Supp 1354, 1358 (D Ariz, 1990); *see also Saucedo v Gardner*, 335 F Supp 3d 202, 217 (D NH, 2018) (“Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters’ ballots are fairly considered and, if eligible, counted.”); *Martin v Kemp*, 341 F Supp 3d 1326, 1338 (ND Ga, 2018) (holding that, having created an absentee ballot regime, the State “must administer it in accordance with the Constitution,” including with “adequate due process protection”).

124. Michigan’s existing procedures for counting absentee ballots, and specifically the ballot receipt deadline, arbitrarily deprive voters of having their ballot counted if those ballots do not arrive in the mail at the clerk’s office, through no fault of their own, by 8 p.m. on Election Day. Under the *Eldridge* balancing test, the ballot receipt deadline is not an adequate means for measuring whether an absentee ballot was timely cast, and the State is required to employ a procedure that more accurately judges whether a ballot was cast within the 40 days preceding Election Day.

125. First, the nature of the interest at stake in this case—the right to vote and to have that vote count—is the most precious liberty interest of all because it is preservative of all other

basic civil and political rights. And the ballot receipt deadline imposes a severe burden on this interest: outright disenfranchisement.

126. Second, the ballot receipt deadline creates a significant risk that properly cast, timely ballots will be rejected. Even under normal circumstances, first class mail takes 1 to 3 business days to be delivered, meaning that ballots properly voted and mailed within the 40 days before Election Day will be rejected because of the ballot receipt deadline. The coronavirus and the budget uncertainties facing the U.S. Postal Service add an even greater degree of volatility and delay to mail service and delivery timelines, ensuring that even more properly cast ballots will be discarded. But the State could easily employ additional or substitute procedural safeguards to ensure that properly cast ballots are actually counted. For example, the State could judge the timeliness of the ballot based on its postmark or when it was received by the clerk, as many other states do.⁶ A postmark date not only offers a reliable date to Michigan voters by which they must cast their ballots, but it also ensures that voters who receive their ballots late through no fault of their own are still able to engage in the franchise. Alternatively, the State could offer an opportunity for voters to affirm that their ballots were timely mailed.

127. Third, because Michigan is not required to finalize its election results until 14 days after the election, *see* MCL 168.822, requiring Michigan to accept ballots that are postmarked on or before Election Day and which arrive within 14 days of Election Day would not burden the State. And, as the Supreme Court has explained, “administrative convenience” cannot justify the deprivation of a constitutional right. *See Taylor v Louisiana*, 419 US 522, 535 (1975).

⁶ *E.g.*, Alaska Stat Ann 15.20.081(e) (10 days); Md Code Regs 33.11.03.08(B)(3) (second Friday after Election Day); Nev Rev State 293.317 (3 days); ORC 3509.05 (ballots postmarked by the day before Election Day are counted); Wash Rev Code 29A.40.091 (postmarked by Election Day); DC Code Ann 1-10001.05(a)(10A) (7 days); W Va Code 3-3-5(g)(2) (5 days).

128. Having guaranteed its citizens the constitutional right to vote absentee, and induced voters to submit ballots by mail, Michigan must establish adequate procedures to ensure that voters have a reliable, fair, and effective method to cast their ballots. Because the ballot receipt deadline renders this process markedly inadequate, and Michigan is readily capable of instituting a substitute procedure which would protect those voters' rights with minimal burden to the State, the ballot receipt deadline violates Michigan voters' procedural due process rights.

COUNT IV

Michigan Constitution of 1963, art 1, § 5 *Right to Free Speech* (Voter Assistance Ban)

129. Plaintiffs reallege and reincorporate by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

130. Article I, Sections 3 and 5 of the Michigan Constitution guarantee to each Michigander the right to free speech, Const 1963, art 1, § 3 (“The people have the right peaceably to assemble, to consult for the common good, to instruct their representatives and to petition the government for redress of grievances.”); Const 1963, art 1, § 5 (“Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press.”), which is at least as protective as the rights guaranteed by the First Amendment, *Woodland v Michigan Citizens Lobby*, 423 Mich 188, 202; 378 NW2d 337 (1985). Accordingly, Michigan courts look to federal precedent for guidance in deciding challenges predicated on the right to speech under the Michigan Constitution. *Mich Up & Out of Poverty Now Coalition v State*, 210 Mich App 162, 169; 533 NW2d 339 (1955).

131. “Political speech is at the core of First Amendment protections.” *Susan B. Anthony List v Driehaus*, 814 F3d 466, 473 (CA 6, 2016). “[L]aws that govern the political process

surrounding elections—and, in particular, election-related speech and association—go beyond merely the intersection between voting rights and election administration, veering instead into the area where ‘the First Amendment has its fullest and most urgent application.’” *League of Women Voters v Hargett*, 400 F Supp 3d 706, 722 (MD Tenn 2019) (quoting *Eu v San Francisco Cty Democratic Cent. Comm*, 489 US 214, 223; 109 S Ct 1013; 103 L Ed 2d 271 (1989)).

132. “[E]ach and every citizen has an inalienable right to full and effective participation in the political process,” *Reynolds*, 377 US at 565, and the choice whether to exercise the right to vote is central to the vindication of that right, *Hargett*, 400 F Supp 3d 706, 724 (MD Tenn, 2019) (“Registering to vote is not a politically neutral act, and neither is declining to.”). Efforts to encourage citizens to exercise political power not only support the democratic process, but also represent an outward manifestation of political expression.

133. The voter assistance ban burdens such core political expression. Courts have found that similar activities aimed at encouraging voters to participate in the political process are constitutionally protected political expression. *Priorities USA v Nessel*, No. 19-13341, 2020 WL 2615766, at *10-11, 13 (ED Mich May 22, 2020) (finding that Michigan’s restrictions on absentee ballot application collection implicate political speech and association).

134. Voter turnout efforts, including assisting voters with the submission of absentee ballots, are a means by which the Alliance and APRI would like to communicate their belief in the power and importance of participating in democratic elections. Such activity is inherently expressive, and a ban on this activity implicates “the type of interactive communication concerning political change that is appropriately described as ‘core political speech.’” *Meyer v Grant*, 486 US 414, 422-23; 108 S Ct 1886; 100 L Ed 2d 425 (1988); *see Hargett*, 400 F Supp 3d at 720

(“Encouraging others to register to vote is pure speech, and, because that speech is political in nature, it is a core First Amendment activity.”) (internal quotation marks and alterations omitted).

135. Accordingly, Michigan and federal courts have applied, at least, “exacting scrutiny” to review laws governing election-related speech, like the voter assistance ban. *League of Women Voters of Mich v Sec’y of State*, – NW2d –, No 350938, 2020 WL 423319, at *14 (Mich App Ct, Jan 27, 2020); *see also McIntyre v Ohio Elections Comm’n*, 514 US 334, 345; 115 S Ct 1511; 131 L Ed 2d 426 (1995); *Priorities USA*, 2020 WL 2616766, at *11; *Hargett*, 400 F Supp 3d at 722. Exacting scrutiny requires a substantial relationship between the challenged regulation and a sufficiently important governmental interest. *Citizens United v Fed Election Comm’n*, 558 US 310, 366-67; 130 S Ct 876; 175 L Ed 2d 753 (2010); *John Doe #1 v Reed*, 561 US 186, 196; 130 S Ct 2811; 177 L Ed 2d 493 (2010). “[T]he strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.” *Id.* And, here, the voter assistance ban is subject to strict scrutiny because it regulates political expression based on the identity of the speaker. *Citizens United*, 558 US at 340-41. That is, it allows certain individuals, members of a voter’s household or immediate family, to engage in political expression but not others, the rest of the general public. Accordingly, it must be narrowly tailored to serve a compelling government interest. *Id.* at 340.

136. The voter assistance ban cannot survive any level of scrutiny because the law proscribes expressive conduct and burdens an ever-wider range of speech and expression, and because any interest in enforcement of the law can be and is served by more narrowly tailored laws.

COUNT V

52 USC 10508, US Const art VI, § 2; 42 USC 1983

Preempted by Federal Law

(Voter Assistance Ban)

137. Plaintiffs hereby incorporate all other paragraphs as if fully set forth herein.

138. Section 208 of the Voting Rights Act of 1965 guarantees to voters with disabilities and voters with limited language proficiency the right to assistance by a person of the voter's choice when voting. 52 USC 10508 ("Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice.").

139. Voting, in this context, includes "all action necessary to make a vote effective in any primary, special, or general election," 52 USC 10310(c)(1), including returning an absentee ballot, *see OCA-Greater Houston v Texas*, 867 F3d 604, 615 (CA 5, 2017) ("To vote,' therefore, plainly contemplates more than the mechanical act of filling out the ballot sheet," as "[i]t includes steps in the voting process *before entering* the ballot box."); *Priorities USA*, 2020 WL 2616766, at *14 (holding that plaintiffs stated a claim that the Voting Rights Act preempts Michigan's ban on absentee ballot application collection); *United States v Berks Cty*, 277 F Supp 2d 570, 580 (ED Pa, 2003) (holding county election law restricting who may provide language assistance to Spanish-speaking voters violated Section 208).

140. The vote assistance ban violates Section 208 and is preempted by the Voting Rights Act. *Altria Grp, Inc v Good*, 555 US 70, 76; 129 S Ct 538; 172 L Ed 2d 398 (2008) ("[S]tate laws that conflict with federal law are without effect.") (citations omitted); *Gade v Nat'l Solid Wastes Mgmt Ass'n*, 505 US 88, 98; 112 S Ct 2374; 120 l Ed 2d 73 (1992) (conflict preemption occurs when (a) it is physically impossible to comply with state and federal law, or (b) "where state law

stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”) (citations omitted).

141. The voter assistance ban’s restriction on who can provide voters with help delivering their ballot is irreconcilable with Section 208 because it criminalizes conduct expressly allowed by the statute. The voter assistance ban unlawfully limits the rights conferred in Section 208 by prohibiting eligible voters from receiving assistance from the person of their choice. *See* MCL 932(f). Under Michigan law, a voter cannot ask a friend, neighbor, or other person or organization they trust to deliver their ballot; they are limited to a state mandated list of permissible assisters, which consists of only election workers and members of their immediate family or household.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment:

A. Declaring that Michigan’s ballot receipt deadline, postage requirement, and voter assistance ban individually and together violate Article I, Section 2 and Article II, Section 4 of the Michigan Constitution;

B. Preliminary and permanently enjoining Defendant Secretary, her respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, from requiring that voters provide postage on their absentee ballots and further require that Michigan provide prepaid postage on all absentee ballots;

C. Declaring that the ballot receipt deadline violates Article I, Section 17 of the Michigan Constitution;

D. Preliminarily and permanently enjoining the Secretary, her respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them,

from enforcing the ballot receipt deadline and further require that they count ballots received within 14 days after Election Day;

E. Declaring that the voter assistance ban violates Article I, Section 5 of the Michigan Constitution and Section 208 of the Voting Rights Act;

F. Preliminary and permanently enjoining Defendant Attorney General, her respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, from enforcing the voter assistance ban and allowing voters to designate any third party—whether paid or not—to assist in the collection and submission of their absentee ballots; and

G. Granting such other and further relief as the Court deems just and proper.

Dated: June 2, 2020

By s/ Sarah S. Prescott

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**Pro Hac Vice Applications forthcoming*